

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2007 MSPB 35**

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Docket No. CB-1216-06-0010-T-1

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**Special Counsel,  
Petitioner,**

**v.**

**Thomas F. Phillips**

**and**

**The Jackson County Sheriff  
Department, and Jackson  
County, Missouri,  
Respondents.**

February 1, 2007

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Amber A. Bell, Esquire, and Rebecca S. McGinley, Esquire, Washington, D.C., for the petitioner.

Robert H. Martin, Esquire, Independence, Missouri, for respondent Phillips.

Paul E. Sullivan, Esquire, Washington, D.C., for respondent Jackson County Sheriff Department and Jackson County, Missouri.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman  
Barbara J. Sapin, Member  
Vice Chairman Rose issues a dissenting opinion.

**FINAL ORDER**

The Office of Special Counsel (OSC) has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative law

judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative law judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115), which is applied by 5 C.F.R. § 1201.125(b) to an initial decision issued on a complaint filed by the OSC alleging a violation of the Hatch Political Activity Act, as the OSC did in this case.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative law judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative law judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS

A party aggrieved by a determination or order of the Board under 5 U.S.C. § 1505 may also obtain judicial review in an appropriate United States district court. 5 U.S.C. § 1508; 5 C.F.R. § 1201.127(b). Judicial review may be obtained by filing a petition in the United States district court for the district in which Mr. Phillips resides within 30 days after the mailing of the Board's final decision.

FOR THE BOARD:

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Bentley M. Roberts, Jr.  
Clerk of the Board  
Washington, D.C.

DISSENTING OPINION OF MARY M. ROSE

in

*Special Counsel v. Thomas F. Phillips*

MSPB Docket No. CB-1216-06-0010-T-1

¶1 The issue before the Board is whether the respondent sheriff and the respondent Jackson County Missouri sheriff's department are covered by the Hatch Act. The Hatch Act states that a "state or local agency" means the executive branch of a State, municipality, or other political subdivision of a state, or an agency or department thereof. 5 U.S.C. § 1501(2). State and local executive branch agencies may agree to abide by the Hatch Act as a condition for receiving Federal funds. In this case, the sheriff's office received Federal law enforcement grants with this condition. Appeal File, Tab 11, Exhibits 2, 5-7.

¶2 Thus, the question arises whether the respondent sheriff department is within the executive branch of the county. The administrative law judge relied upon the Board's decision in *Special Counsel v. Bissell*, 61 M.S.P.R. 637, 640-41 (1994), to conclude that the Office of Special Counsel (OSC) failed to meet its burden of proving that the respondents were in the executive branch. Appeal File, Tab 15 at 4-8. I disagree.

¶3 In *Bissell*, the Board found that in order to establish a violation of the Hatch Act by a state or local officer or employee, OSC must first prove by preponderant evidence that the respondent is an employee or officer of an agency within the executive branch of the local government. The Board further stated that it will examine state law sources in making this determination, and held that the "critical factor" is the branch of the state government that controls the respondent, rather than the function that the respondent agency performs. *Id.* at 641-43. The Board stated that emphasizing the agency's function is misplaced because the doctrine of separation of powers does not prohibit the commingling

of all functions. In determining which branch of government controlled the respondent agency the Board looked to whether the agency officials were elected or appointed by the executive, the branch of government controlling its funding and personnel policies, and whether the agency was perceived as being part of the executive or legislative branch. *Id.* at 644-47.

¶4 I agree with OSC's arguments that, applying *Bissell's* analytical framework, yields the conclusion that the respondents are within the county's executive branch. Petition for Review File, Tab 1. Specifically, the record shows the following: the county's executive branch controls the sheriff department's funding; the legislative branch does not supervise the sheriff department's personnel policies; unlike legislative branch employees, the sheriff department's employees are subject to the county's merit system; there is no precedent or opinion finding that the sheriff department is a legislative branch agency; and the sheriff department's functions are consistent with executive branch functions. Appeal File, Tab 11. These facts support the conclusion that the sheriff department is within the executive branch.

¶5 I would further find that, to the extent *Bissell* could be viewed as supporting the administrative law judge's conclusion that OSC failed to prove that the sheriff's department is an executive agency, it is distinguishable from the circumstances at issue here. *Bissell* concerns a state-level utility regulatory commission, while the present case involves a local law enforcement agency. I believe that agency function is a critical factor here because county law enforcement is, by its very nature, an executive, rather than judicial or legislative, function. See Black's Law Dictionary 590-91 (7<sup>th</sup> ed. 1999) ("executive department" defined as the branch of government that effects and enforces the laws, and "executive powers" defined as the power to see that laws are duly executed and enforced). Further, in *Bissell*, the state courts had determined that the public service commission exercised commingled legislative, executive and judicial functions, evidence showed that state officials, including the Attorney

General, did not consider the commission to be part of the executive branch, and that other evidence showed that states differed regarding whether their public service commissions were executive agencies. 61 M.S.P.R. at 643-48. Here, however, there is no evidence that Missouri state courts or senior state officials consider state or county laws enforcement to be outside the executive branch.

¶6 This conclusion, that the sheriff's department is within the executive branch, is also consistent with Dillon's Rule, which pertains to the construction of state enabling statutes. Missouri courts have explained that Dillon's Rule is the established principle that local governments "have no inherent powers but are confined to those powers necessarily implied in the authority to carry out the delegated powers," and that this strict rule retains "considerable vitality" in the state. *Premium Standard Farms, Inc. v. Lincoln Township of Putnam County*, 946 S.W. 2d 234, 238 (Mo. 1997). More specifically, the Missouri courts have stated that counties, like other public corporations, can only exercise powers that are either granted in express words, are necessarily or fairly implied in, or incident to, the powers expressly granted, or are essential to the declared objects and purposes of the corporation. *Id.* The courts have further stated that any fair, reasonable doubt concerning the existence of power is resolved against the corporation, and the power is denied. *Id.*

¶7 Here, the Missouri Constitution, like the U.S. Constitution, provides for a separation of powers that includes legislative, executive and judicial branches. Mo. Const. art. II, § 1. There is neither evidence nor argument in the present case indicating that Missouri has conferred to local government the authority to assign the law enforcement functions of a sheriff's office to a branch of government

other than the executive branch. I would, therefore, find that OSC met its burden of proving that the respondents are within the county's executive branch and that the Board has jurisdiction over the complaint.

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Mary M. Rose  
Vice Chairman

## CERTIFICATE OF SERVICE

I certify that this Order was sent today to each of the following:

Electronic Mail	Robert H. Martin, Esq. 311 West Kansas Street Independence, MO 64050-3771
U.S. Mail	Thomas F. Phillips c/o Robert H. Martin, Esq. 311 West Kansas Street Independence, MO 64050-3771
U.S. Mail	Paul E. Sullivan, Esq. The Jackson County Sheriff Department And Jackson County, Missouri 1010 Wisconsin Avenue, N.W., Suite 725 Washington, DC 20007
U.S. Mail	Amber A. Bell, Esq. Rebecca S. McGinley, Esq. U.S. Office of Special Counsel 1730 M Street, N.W., Suite 218 Washington, DC 20036-4505

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February 1, 2007

(Date)

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Dinh Chung  
Case Management Specialist